

No. 81314-1

SANDERS, J. (dissenting)—Based on *State v. Devin*, 158 Wn.2d 157, 142 P.3d 599 (2006) the majority refuses to follow the abatement ab initio doctrine so expressly recognized in *State v. Furth*, 82 Wash. 665, 144 P. 907 (1914). However for the reasons set forth in my concurring opinion in *Devin*, 158 Wn.2d at 172-73, “the majority’s discussion of the merits of the doctrine of abatement ab initio is obiter dicta in its entirety” because there was nothing to abate due to the fact that Devin failed to file a timely appeal of his conviction. I would therefore adhere to the result and reasoning of *Furth* and abate this criminal prosecution ab initio.

Moreover, the majority appears to shape its alternative approach of substitution without benefit of citation to Washington precedent and without recognition of the practical difficulties this would involve. Obviously the substituted heir would not be subject to the same criminal penalties of the deceased defendant, and therefore, it is a stretch to say that “the interest of a party in the subject matter of the review has been transferred.” RAP 3.2(a), *quoted by* majority at 8.

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I dissent.

AUTHOR:

Justice Richard B. Sanders

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WE CONCUR:

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